Excerpts From Government's Exhibit 18 (Petitioner's Affidavit in Support of Motion)

SYNOPSIS OF FACTS NECESSARY FOR THE MOTION

12. *The Texas-Adams Takeover.* On September 27, 1955 Peter Crosby, William J. McCarthy and Worth Pettit, Jr. purchased the controlling block of Texas-Adams stock in the name of American Montana, all of whose stock they owned, and of which they were the officers and directors. The Government presented me as one of the principals in Texas-Adams. This is a false picture. The principals were in fact the three defendants named in Count 1 of the indictment, and Thomas K. Hudson of Denver, Colorado, who was general counsel for the company, and also an officer and director.

In New York the attorneys for Texas-Adams, American Montana and the three count 1 defendants were Messrs. Annenberg & Greene, who acted as counsel in the so-called takeover of control of Texas-Adams. They had been Crosby's attorneys prior to that episode, and continued as counsel for the named parties until some time after November 8, 1955, on which date Crosby resigned as an officer and director of Texas-Adams.

13. Prior to the takeover I had been a member of and counsel to several syndicates formed and headed by McCarthy, who were desirous of purchasing the valuable oil properties of Ajax located in Montana and Wyoming. These efforts failed. None of the work upon which I had been engaged for these syndicates had anything to do with Texas-Adams. But the government maintained that it did. This because when McCarthy and Crosby finally did acquire control of Texas-Adams they attempted to pick up the pieces of the Ajax transaction. The govern-

ment contended that my activities prior to the takeover of Texas-Adams merged into the Texas-Adams scheme to acquire the Ajax properties and motivated my participation in the fraudulent Count 1 scheme even though the Grand Jury did not charge me with it.

Thus at the trial by reason of representations made by government counsel to show connection and motive, the government was permitted to offer a mass of testimony and evidence, known and referred to as the "Homestead" evidence. It is this evidence which it is necessary for me now to synoptisize in order to demonstrate the specifics of the instant motion.

14. *The Homestead Transactions.* As indicated above, I was involved long before the Texas-Adams takeover, in several efforts to acquire the valuable Ajax oil properties on behalf of two separate syndicates. The stockholders of Ajax were willing to accept cash and stock in a well regarded company for the properties owned by Ajax.

In both instances Homestead was a link in a chain of mergers, and was supposed to furnish some of the cash necessary to make a partial downpayment.

The first syndicate proposed to use the stock of Dumont as part of the purchase price. Toward that end, the McCarthy group contracted to purchase control of Dumont, and made agreements to merge Dumont and Homestead, and to purchase the Ajax properties with cash and Dumont stock.

While these negotiations were going forward Homestead deposited $50,000 in a Billings, Montana bank as evidence of financial ability to perform. But though those who

owned the controlling block of Dumont stock had contracted to sell it to McCarthy's group, they withdrew; and the project failed of consummation.

The second syndicate proposed to use the stock of Continental as part of the purchase price. Toward that end McCarthy joined forces with Fassoulis, who had contracted to purchase the controlling block of stock in Continental. Both Homestead and Ajax agreed to the substitution of Continental for Dumont. Homestead agreed to merge with Continental, and Ajax agreed to take cash and Continental stock as the purchase price. In the course of these negotiations Homestead advanced $50,000 and $19,000 in cash, and in a collateral transaction loaned me $90,000 on behalf of the syndicate to purchase 1,800,000 shares of its stock for the purpose of raising additional cash for Homestead. But the Continental deal also failed of consummation.

16. *Texas-Adams and Homestead.* After McCarthy, Crosby and Pettit acquired control of Texas-Adams on September 23, 1955, McCarthy and Pettit went to Denver where they met with Thomas K. Hudson, an attorney for Homestead, and on October 12, 1955 a merger agreement was entered into between Texas-Adams and Homestead, and again an effort, in which I had no interest and in which I did not participate, was made to purchase the Ajax properties. These negotiations were carried on in Denver with counsel for Ajax; but that transaction also failed of consummation.

17. This summarizes the various efforts to acquire the concededly valuable Ajax properties. The government saw in all this a continuing process. This theory led to the

conclusion that I was involved in the Texas-Adams takeover, and, because of alleged derelictions on my part in connection with my representation of the Dumont and Continental syndicates, I had ulterior motives for joining the McCarthy-Crosby combine in all of its operations and activities.

Against this background the perjuries of Holland and Carroll become crucial to me, as did also the perjury of Kimmes. Jones's affidavit bears on the perjuries of Holland and Carroll, and my affidavit demonstrates the perjury committed by Kimmes.

18. *Carroll's perjuries known to be such by government.* It was part of the government's theory of the case that I knew all about the proposed Texas-Adams takeover before it took place on September 27, 1955; that I had misused and/or misappropriated a total of $159,000.00 of funds belonging to Homestead during the ill-fated Dumont and Continental efforts to acquire the Ajax properties; that I had wrongfully appropriated to myself shares of Homestead stock; that on the negotiations and transactions with Homestead, I was acting solely on behalf of a restricted McCarthy group which did not include Homestead and its promotors (Holland, Carroll, Jones, et al.); that to cover my derelictions with regard to Homestead I continued along with the McCarthy-Crosby Texas-Adams agenda of plans and operations. Carroll's testimony was offered in partial support of this theory.

19. Carroll perjured himself in the following material particulars:

(a) That on three occasions prior to the Texas-Adams takeover on September 27, 1956, McCarthy in my presence

and/or I allegedly told him that Texas-Adams might possibly be used to merge with Homestead, to wit, in June, July and finally on August 8, 9 or 10, 1955.

(b) That I allegedly arranged the temporary one-day $90,000 loan with which I purchased the 1,800,000 shares of Homestead stock.

(c) That Homestead allegedly was not a member of the syndicate acting to acquire the Ajax properties.

(d) That his firm allegedly did not pay me $1,000 as part payment of legal fees for services rendered to the syndicate.

20. A crucial point in the so-called Homestead evidence was whether or not I knew anything of, or participated with McCarthy and Crosby in the fraudulent takeover of control of, Texas-Adams. Carroll testified concerning this.

He testified that in the middle of July, McCarthy claimed control of Texas-Adams in my presence (J. A. 518a-20); that on July 22, 1955 in Denver McCarthy and I both claimed such control (J. A. 523-24a); and that on August 8, 9 or 10, 1955 I told Carroll that the most likely corporate vehicle to be used for merging with Homestead was Texas-Adams (J. A. 526a-27a)—testimony designed to link me with knowledge of and participation in the fraudulent Count 1 scheme.

21. Many days later another government witness, Rosen, testified: that he and Crosby placed an advertisement in the Wall Street Journal on August 9, 1955, seeking control of a public company; that he received a reply from the broker defendants; and that he and Crosby conferred

with them thereafter regarding purchase of their controlling block of Texas-Adams shares (J. A. 1337a-40a; 1352a-3a; Goldberg, R. and G. Ex. 18).

22. The prosecutor himself referred to that advertisement as "*The one that led to Texas-Adams*" (J. A. 1337a). Moreover, Rosen had been subjected to intensive interrogation before the trial (J. A. 1354a-57a); and the prosecutor obviously knew the facts regarding that advertisement, and the events it set in train, before Carroll testified.

It is therefore plain: that Carroll's testimony about conversations with me and in his presence regarding Texas-Adams long before Crosby's first meeting with the broker defendants, was necessarily false; and that the prosecutor knew it was false when he adduced it. But I do not rely on inferences, however, conclusive.

In response to my brief in the Court of Appeals, which demonstrated the falsity of that testimony and its conscious use, the government's answering brief conceded that "*Carroll's testimony that Texas-Adams was mentioned at the July 22 meeting was unquestionably wrong*"; and it added in a related footnote: "There is, of course, no way of knowing whether Carroll's recollection was in error *or whether he wilfully perjured himself.*" (pp. 223-23; emphasis supplied). But it claimed absolution for offering it on the ground that the government itself proved he was mistaken through Holland's prior testimony "that only Dumont was mentioned at that meeting and that Texas-Adam's name did not come up until mid-September (J. A. 336a-37a, 348a)" (*id.*). If Holland had given such testimony, it could not excuse a deliberate offer of contradictory testimony which the prosecutor knew was false.

Excerpts From Government's Exhibit 18

But even the excuse itself was false: the government's cited references to the record did not support, nor does the record elsewhere, its claim respecting Holland's testimony; and it ignored the fact that Holland was not present at the earlier meeting in New York in mid-July. (J. A. 518a) and therefore could not contradict Carroll's testimony about that meeting, and it was completely silent as to the August meeting.

23. The government also asserted in its answering brief there that it would have been "grossly improper" to prevent Carroll "from testifying to what was his recollection", and that it "had no choice but to permit Carroll to testify as his recollection dictated"—although, concededly, it had "no way of knowing whether Carroll's recollection was in error or whether he wilfully perjured himself" (p. 223).

24. The proposition that the government is under a duty to adduce false and prejudicial testimony at the behest of a witness it knows is either mistaken or perjurious, is palpably indefensible. But assuming its validity *arguendo*, its necessary corollary is a duty to disavow such testimony before the jury. There was no such disavowal by the prosecutor in summation or elsewhere.

25. To remove any last vestige of doubt that the government knew or should have known that Carroll was lying when he brought in the name of Texas-Adams in my presence in July and August 1955, there is the accompanying affidavit of Jones wherein he swears not only that the statement of Carroll bringing in the name of Texas-Adams on July 22 in Denver was false, but also that he told the government attorneys it was false.

Excerpts From Government's Exhibit 18

26. Carroll also lied with respect to another very important issue in the case.

For whom was I acting? My defense was that with respect to all the moneys I received from Homestead—the $50,000, the $19,000 and the $90,000 loan (totalling $159,000.00)—I was acting for a syndicate of which Homestead and the Jones group were members.

On August 10, 1955 I purchased 1,800,000 shares of Homestead stock for 5¢ a share. The purpose was to complete the public sale of the Homestead stock sold under a Regulation A exemption. Jones and Fassoulis, members of the syndicate, had stated that they could sell these shares in Birmingham, where Jones resided, and in New York. Carroll had been unable to sell the entire issue in Denver. The $90,000 to be realized from the public sale of the stock would then be used by Homestead for syndicate purposes (J.A. 1740-1740a).

The mechanics were as follows: I made a temporary one-day loan aggregating $90,000. I then purchased the stock from Homestead, which put Homestead in funds. Homestead then loaned me the $90,000 which I then used to repay the temporary loans (J.A. 538a-9a, 559a-63a).

In testifying Carroll, admitted familiarity with the transaction but sought to make it appear that I had engineered it on my own behalf.

But on cross examination Carroll wavered. He admitted that I had borrowed $50,000 from one Gold, and that he, Carroll, knew about it (J.A. 560a-1a). He admitted that his own firm had loaned me the additional $40,000 (J. 561a). He finally but reluctantly admitted that Gold was his

partner (J.A. 538a). It must be obvious, therefore, that it was Carroll who arranged the temporary loans. He refused to admit that I was representing a syndicate of which he, Homestead, Jones and others were members. He did say that I was acting for the McCarthy group (J.A. 866a). He denied being a member of that group (J.A. 866a) or of any syndicate for which I was acting as attorney (J.A. 866a).

But he was shown the bottom half of a voucher form of check which he identified as his firm's (J.A. 867a). It showed that it had been a part of a check bearing the number 2386 (M-EX 13). Typewritten on it was the following legend: "Syndicate expenses—legal fees—$1,000." (J.A. 868a). He said then that he could not recall to whom the check had been issued nor the date of issuance. He said he could not remember whether it had been paid to me for services to the syndicate (J.A. 868a).

Thus the matter was left, and the government did nothing to help the defense, though it had at hand the means to learn the truth. Carroll had testified that all of the firm's books and records had been destroyed at his instance, and he had no way of checking the facts. They had been destroyed about a year before the trial (J.A. 867a) at the very time Texas-Adams was the subject of investigation by the Attorney General of the State of New York, the government, and the trustee in bankruptcy of Texas-Adams (J.A. 552a.)

27. Long after Carroll had left the stand and departed for Denver, I was able, through Carroll's bank, to obtain a photostat of the check itself. It showed me as the payee of the $1,000 check and the date as August 10, 1955, the

very day I purchased the 1,800,000 shares of stock and the day I borrowed the $90,000 from Homestead.

Carroll had lied about Homestead participation in the syndicate for which I had been acting.

28. Had the facts favorable to me been disclosed by the government, the jury could not have been misled by any assertion that I had misappropriated 1,800,000 shares of Texas-Adams stock, or any money. It would have been clear that I was acting for a legitimate group of people who wanted to acquire the valuable Ajax properties in a completely legal manner. My role as attorney and agent for the group would then have been clearly disclosed, and there would have been no inference that I had acted independently for any benefit of my own.

29. Jones could have set the entire matter straight. The government attorneys knew the facts from Jones, and what Jones told them could easily have been checked. But the government kept Jones in readiness as a witness for weeks at a time, and then suddenly shipped him off, thus suppressing the evidence that would have disclosed beyond any question that I had not misappropriated shares of Homestead stock and that all my actions were on behalf of the McCarthy-Fassoulis interests on the one hand and the Homestead-Jones interests on the other. In short, I had nothing to hide about my relationship to and in my dealings with Homestead a—fact which would have shattered the government's theory.

30. *Holland's perjuries known to be such by the government.* It was part of the government's theory of the case,

as I indicated above (and I repeat it now to focus attention on Holland), that I misappropriated to my own use $19,000 in cash of Homestead's funds; that I abused a trust with regard to $50,000 of Homestead's funds; that I procured a loan of $90,000 from Homestead in order to purchase 1,800,000 shares of its stock without the knowledge of Holland, its president; and that this misconduct led me into further frauds with McCarthy and Crosby in an effort to conceal these misfeasances and malfeasances. Holland's testimony was proffered in support of this theory.

31. Holland perjured himself in the following material particulars:

(a) As to the alleged assertion that I stole $19,000 of Homestead's funds.

(b) As to the alleged assertion that I misused $50,000 of Homestead's money.

(c) As to the alleged assertion that I borrowed $90,000 from Homestead without his knowledge.

(d) As to the alleged assertion that he did not know I used the $90,000 to purchase 1,800,000 of Homestead stock for the syndicate of which Homestead was itself a member. (He also perjured himself as to an important collateral issue, and thus exposed his lack of credibility on any score.)

(e) That he had only a casual acquaintance with Paul R. Jones.

(f) That he had never done any business with Paul R. Jones.

Excerpts From Government's Exhibit 18

(g) That he did not know the principals behind the Jay Cee Trading Company.

(h) That he did not know that Jay Cee Trading Company was the tenant of the premises occupied by him, and that he was a subtenant who paid no rent.

32. It was important for my defense to show that Jones and Carroll were the real promoters of Homestead, and that Holland was only a "front for their activities.

As Homestead's president, Holland was under fire (J.A. 458a) at the time of his testimony. Bankruptcy proceedings were pending in Denver, Holland's home town, where many of the Homestead stockholders lived. In addition, Texas-Adams was bankrupt, and Holland was trying to save himself from a possible lawsuit by the trustee in bankruptcy of Texas-Adams for misfeasance and malfeasance in the handling of Homestead's funds.

33. Holland's attempt to cover himself led him to tell big and little lies. Thus Holland falsely denied that Jones occupied an office or even had a desk in the suite that Holland also occupied (J.A. 384a)—a denial subsequently flatly contradicted by Carroll. Now Jones in an accompanying affidavit swears that he told the government attorneys that Holland way lying. Holland denied that he had ever dealt with Jones (J.A. 450a), a denial contradicted by Exhibit M6, which was executed by Holland and by Jones. Now Jones in an accompanying affidavit swears that he told the government attorneys that Holland was lying. Holland swore before the grand jury that the $50,000 which Homestead had advanced in connection with the Ajax deal, had been transmitted to me as a trustee

through the Chemical Corn Exchange Bank, and that daily demands for repayment followed his discovery that they were no longer on deposit there, although he alone had directed the transmittal of those funds for the Continental deal (J.A. 480a). This involved the purchase of the controlling block of stock of Continental Car-Na-Var, a corporation listed on the American Stock Exchange, whose stock was to be used as part of the purchase price of the Ajax properties.

34. But more important and vital to my defense was Holland's denial that he knew anything about Homestead's loan to me of $90,000 in order to purchase 1,800,000 shares of Homestead stock for syndicate purposes (J.A. 351a). (The government in its opening to the jury and in its trial memorandum to the Court promised to prove that I had obtained 1,800,000 shares of Homestead stock under circumstances which amounted to larceny. It was important therefore for the government to attempt to show that I had tricked Homestead by by-pasing Holland, its president.) But the government knew at all times that Holland was lying in this regard. Not only had Carroll told them that Holland was present at the time that the $90,000 deal was arranged (J.A. 561a); but also they had Jones's statements that Holland had called him from Denver to advise him that Carroll had made the arrangements for me to close out the Homestead deal on behalf of the syndicate and that he, Jones, had told Holland to send me to Birmingham where he, Jones was sure he could dispose of the bulk of the stock. Now Jones in an accompanying affidavit swears that he told the government attorneys that Holland was lying.

35. All this evidence was suppressed even though the government knew that Holland had testified falsely in view

of Carroll's testimony with regard to the matter, and Jones's repeated statements to them. Had the jury been shown the true picture of what had happened, the sting of a larceny charge against me would have been removed from the case. It would have been clearly disclosed that I had acted in good faith with regard to the 1,800,000 shares of Homestead stock, all of which had been restored to McCarthy and Hudson for Texas-Adams.

This single instance was one of the main props upon which the government based its charges against me. But the testimony of Holland that he knew nothing of the $90,000 loan and my purchase of the 1,800,000 shares of Homestead stock on behalf of the syndicate of which Homestead was a member, until he learned of it in New York on September 15 at the St. Moritz "showdown" conference was false; Jones told the government times without number that Holland was a liar as to this; and the government had the means at hand in the subpoenaed witness Jones, in Carroll's testimony and in documentary evidence in its possession to exonerate me of any charge of fraud in this matter.

36. *An extremely prejudicial charge against me was that I stole $19,000 from Homestead.* In his opening to the jury the government prosecutor said that in the Homestead transaction I reaped a wrongful profit of Homestead stock and $19,000 (J. 143a-5a). But William Branch, the lawyer who, acting for Homestead, wired the funds to me, knew at the time that they were to be used to forward the acquisition of control of Continental Car-Na-Var by Fassoulis. $15,000 was immediately paid to Matthew Fox to repay him in part for advances made in furtherance of the purchase of control (J.A. 1753a), and $4,000 was allowed to me on account for my services to the syndicate (J.A. 1756a-7a).

Excerpts From Government's Exhibit 18

37. Holland denied all knowledge of this. He said he did not know of it until some time in September. Then the government argued that the charge against me of larceny with respect to these funds established a motive for my participation in the Count 1 scheme. But Jones was prepared to testify that Holland knew all about the $19,000 long before September and indeed knew about it at the very time Branch had the money wired to me. That Holland knew about the $19,000 before he came to New York is apparent because Hudson knew about it according to Holland, when • • •

• • •

• • • continuing to have it appear that these funds were under my control.

41. Holland's perjuries were numerous and prejudicial. Had the truth, which was known to the government, not been suppressed, as Jones's affidavit shows, the jury would not have been left wondering about the allegedly stolen Homestead shares, the allegedly misappropriated $19,000, the allegedly misused $50,000, and any possible fear I might have had as to criminal liability for my conduct as furnishing a motive and intent for my subsequent conduct.

42. *Kimmes' Perjury.* It was the government's theory that I knew that McCarthy, Kimmes and others had concocted a scheme to rig the market in Texas-Adams stock, and that the participating brokers were to receive Texas-Adams stock as a bonus for their efforts. Kimmes' testimony was offered to support this theory.

43. Kimmes perjured himself in the following material particulars:

Excerpts From Government's Exhibit 18

(a) That I attended the February 23, 1956 meeting at the St. Moritz Hotel at which time I gave him certain particulars regarding Texas-Adams and the marketability of certain shares of its stock.

(b) That I attended a meeting in Denver on March 20, 1956, at which time McCarthy turned over shares of stock to him as escrowee in connection with the market rigging operation.

• • •

56. Where fundamental and constitutional rights have been invaded or denied, it is not necessary to prove prejudice—so the cases hold. But I have proved prejudice. I was prejudiced by the government's contentions established by perjured testimony and/or the suppression of evidence with respect to the following:

(a) that I stole $19,000 of Homestead funds;

(b) that I misused and misapplied $50,000 of Homestead funds;

(c) that I acquired Homestead shares without consideration;

(d) that I had dealings with Jannis after I had learned of the deception practiced on me by Crosby;

(e) that I participated in the market rigging scheme of McCarthy and the brokers;

(f) that I misled Purcell in the Empire transaction as to the purpose of the S. E. C. meeting in Denver;

(g) that Crosby was my partner in the pre-Texas-Adams takeover transactions;

Excerpts From Government's Exhibit 18

(h) that I had knowledge of the McCarthy-Crosby-Pettit joint venture into Texas-Adams long before it took place.

57. I believe that by my affidavit, and those of Jones, Jannis, Reed and Purcell, I have shown that Holland, Carroll and Kimmes committed perjuryffl that Miller was mistaken about the date of our meeting; that I did not deliberately mislead Purcell; and that I was indeed hornswoggled by my clients. If, as the Court of Appeals said, "some apparently damning testimony has been convincingly explained away" by me, and if my innocence rests on the hypothesis referred to in paragraph 8 of my affidavit, then I believe I can rightfully say the testimony which will be given by affiants on this motion will establish my innocence. I believe that these affidavits meet the challenge of the Court of Appeals, and that the testimony at the hearing on this motion, and on a new trial, will convincingly explain away all the damning testimony on which the government relied.

58. In any event, the interest of justice compels the granting of this motion. It is unthinkable that a conviction based on the knowing use of perjurious testimony and suppressed evidence, followed by a severe sentence, should be allowed to stand.

LEO B. MITTELMAN

Sworn to before me this
15 day of May, 1962.

HOWARD E. FRANCISCUS,
Howard E. Franciscus, Parole Officer
Federal Detention Headquarters
New York, 14, N. Y.

Affidavit of Co-defendant Jones (Submitted With Government's Exhibit 18)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

against

FRANCIS PETER CROSBY, et al.,

Defendants.

State of New York
County of New York—ss.:

PAUL R. JONES, being duly sworn deposes and says:

1. I reside in Birmingham, Alabama.

2. I am making this affidavit at the request of Leo B. Mittelman, and I have been advised that he intends to use it in connection with a motion for a new trial.

3. At his request I have read the transcript of testimony given by Robert E. Holland and Howard P. Carroll at the trial of the instant prosecution.

4. I was named as a co-conspirator in the case. I was never called before the Grand Jury. However, I was inter-

viewed by post inspectors in Charlotte, North Carolina, and was interviewed on numerous occasions by the government attorneys in New York City both before and during the trial. I was under subpoena to appear at the trial. I was in New York for many weeks during the trial waiting to testify. At the last moment and just before the government rested its case, I was advised that I would not be used by the government as a witness and it was suggested that I leave town.

5. The government told me about 5:00 o'clock in the evening that it was not going to use me. That same evening my wife and I packed and we left New York City in my automobile, and we started travelling. The first night we stayed in Maryland; from Maryland we went on to Washington, D. C., where we stayed several days. Then we continued our travelling by automobile to North Carolina and from there to Texas. This travelling by automobile from New York City to Texas took some three weeks. During this period it would have been impossible for any one other than those whom I telephoned to locate me and needless to say, I did not telephone Mr. Mittelman or any of the other defendants in the instant case.

6. A great deal of the testimony of Carroll and Holland in the instant trial was false. I make this statement of my personal knowledge and I add that I advised the government attorneys that much of their testimony was false, and in ensuing portions of this affidavit I will refer to specific of their statements which I told government attorneys were false.

7. Carroll testified that at a meeting in Denver on July 22, 1955 McCarthy and Mr. Mittelman "discussed

• • • the merger of Homestead into one of the McCarthy companies" and named Texas-Adams as one of those companies (J.A. 523a-24a). This statement is false. I was present in Denver at that time, and I can say that there was no mention then of Texas-Adams. I was not advised of Texas-Adams until on or about November 1, 1955 when Thomas K. Hudson, who is named as a co-conspirator but not a defendant in the instant case, told me about it when he came to see me on a visit to Birmingham, Alabama.

8. Before coming to Birmingham, Alabama, on this occasion Hudson telephoned me to tell me that he was coming, and that he wanted to visit me in connection with some business matters involving a substantial corporation in which he had an interest and which he would control. When Hudson got to Birmingham this substantial corporation turned out to be Texas-Adams. He briefed me on his relationship to Texas-Adams. He told me that he had become associated with William J. McCarthy and others, and that he believed that under his guidance this company could be made into a tremendously profitable venture. In the course of the discussion the name of Mr. Mittelman came up, and he told me that Mr. Mittelman was no longer associated with the enterprise. He told me that the McCarthy group consisted of Messrs. McCarthy, Crosby and Pettit.

9. The discussions between Hudson and me began at my home and continued far into the night at a suite at the Dinkler-Tutwiler Hotel in Birmingham. At the meetings at the hotel, McCarthy, Crosby and Pettit joined the discussions as well as E. W. Sterling Graham, named as a co-conspirator but not a defendant in the instant case and

Leslie Allenstein. In these further discussions, which continued on November 2, the name of Mr. Mittelman came up again. This time McCarthy told me that Mr. Mittelman was not associated with him any longer.

10. During the trial of the instant case I was here under subpoena by the government for a period of some five weeks. Every evening at 4:30 on instructions from the government I reported at the United States District Attorney's Office at Foley Square. Repeatedly on these occasions I told the government attorneys that Carroll and Holland who preceded him were lying.

11. Carroll and I had the Jay Cee Trading Corporation, a Colorado corporation. I was the Jay and Carroll was the Cee. This corporation occupied premises in the Farmer Union Building, Denver, Colorado. Carroll and I organized this corporation at his suggestion. Immediately after Carroll and I had organized the Jay Cee Trading Corp. we moved Holland and another lawyer by the name of William Branch into the premises of Jay Cee Trading Corp. Holland paid no rent for the premises which he occupied and he was at my beck and call for such services as I required.

12. Shortly after the organization of Jay Cee Trading Corp., Carroll, Branch and I caused the organization of the Homestead Oil & Uranium Corporation (Homestead). I asked Holland to become the president of Homestead because he was a member of the State Legislature of Colorado, and his father was a Supreme Court Judge there. I put up, and Holland knew this, the $10,000. which represented the first deposit into the Homestead account.

After all, Holland was president of this company. When Holland testified that he had no business dealings with me he lied. When Holland disclaimed knowing that I had an office in the same suite in which he had one, he not only told a lie, but he told a big lie. This was a deliberately big lie. I had the big, the elaborate office in that suite. The name Jay Ce Trading Corporation was the top name on the entrance door. Furthermore, my daughter was employed as confidential secretary to the Jay Cee Trading Corporation for a period of months. When Holland disclaimed knowing that I lived in Birmingham he lied. When Holland testified that he knew nothing about the $90,000 loan to Mittelman, he lied. It was Holland himself who called me in Birmingham in August to discuss this matter. When Holland testified that he knew nothing about the organization of Sundown of Colorado he lied. I was present in the office, as was Holland, at the time that Mr. Branch drew the incorporation papers. The company was organized specifically to close the Ajax deal, which Holland well knew. I became an incorporator of the company at his suggestion. Mr. Branch, at my suggestion, paid the disbursements for the organization of the corporation.

13. I told the government about all these lies of Holland. I told the government attorney that Holland was not only a liar, but also that he was a big liar.

14. I was connected with various other transactions as to which the government introduced evidence in the instant prosecution: Longview; Osage; American Montana; Tailorcraft; and Warrior. My connections in all these transactions were with McCarthy, Crosby, Pettit, Hudson and Meredith. They were not with Mr. Mittelman. I know of

my own knowledge, and so advised the government, that Mr. Mittelman had no connection whatever with these matters and that the attorneys who were involved in them were Hudson in Denver, and Annenberg & Greene in New York, who I was informed, were the attorneys for the Crosby-McCarthy group.

PAUL R. JONES

(Sworn to by Paul R. Jones, April 2, 1962)

Excerpts From Affidavit in Opposition to Motion (Mittelman's Exhibit B)

* * *

The Homestead Evidence and the Jones Affidavit.

6. Mittelman asserts, as he did unsuccessfully on appeal, that in connection with the evidence concerning the Homestead Oil and Uranium Co., Government counsel knowingly adduced perjured testimony by the witnesses Holland and Carroll. This claim rests on two false assumptions:

a) That, since Jones would allegedly contradict some of their testimony, they necessarily lied; and

b) That, since Jones allegedly told Government counsel that he would contradict their testimony, Government counsel was bound to believe Jones and thus knew that they lied.

7. It should be noted at the very outset that Mittelman's papers do not contain affidavits by Holland and Carroll recanting their trial testimony. All that we have is the affidavit of a third party who allegedly would con-

tradict some of their testimony. Had Jones so testified at trial it would have been for the jury to decide who was telling the truth. Certainly, at this late point, there is no reason to assume that Holland and Carroll lied merely because Jones says so.

8. Even assuming that Jones so advised Government counsel before trial, the Government was not obliged to take Jones' word against that of Holland and Carroll. Government counsel were familiar with Jones' extensive criminal record, which includes convictions for first degree murder for which he received a life sentence, wartime violation of the O. P. A. Ration Act, vagrancy, bribery for which he received 3 years in prison and conspiracy to conceal narcotics for which he received 5 years in prison, and had good reason to accept Holland and Carroll's testimony as against that of Jones. Indeed, Mittelman himself in his brief on appeal characterized Jones as "shadowy" (P. 49), an "unscrupulous scoundrel" (P. 52) and "the author of the nefarious Osage Scheme" (P. 52 n. 62). Thus, at best, the issue boiled down to nothing more than a conflict of testimony between two witnesses of unblemished reputation and a convicted murderer, briber and narcotics dealer who had been named in the indictment as a conspirator. The contention that by rejecting Jones' version in favor of Holland and Carroll Government counsel "knowingly used perjurious testimony" is as scandalous as it is absurd.

9. Mittelman specifies four instances in which Carroll allegedly committed perjury and eight instances of claimed perjury by Holland. It should be noted in the first instance that almost all of these alleged perjuries were matters raised not in these witnesses' direct testimony but rather their cross-examination. (See particularly the Government's supplemental Brief on appeal, pp. 1-12

where the Government replied to these identical accusations. The Court of Appeals found that "any direct or veiled charge of actual misconduct leveled against the Government's attorneys is wholly without substance." 294 F. 2d at 943) It is difficult to understand how Government counsel can be accused of having "knowingly used perjurious testimony" when defense counsel, not Government counsel, asked the questions that elicited the allegedly perjurious testimony.

10. The only two matters complained of which were adduced on direct examination are Holland's testimony that he did not know about Homestead's advance of $90,000 to Mittelman until September, and Carroll's testimony that Texas Adams had been mentioned as the possible vehicle for merger at the July meetings. In this connection, the following considerations are dispositive of the case:

a) Both of these issues were raised by Mittelman on his direct appeal (Brief, pp. 25-26-69) and were rejected by the Court of Appeals:

b) The Government did not reply on this allegedly perjurious testimony at trial. Indeed, it expressly rejected Carroll's testimony in its Trial Memorandum. If Mittelman wanted a more express rejection of this testimony, he should have asked for it.;

c) It was the Government that adduced evidence at trial which contradicted Holland and Carroll on these two points.

11. Mittelman contends that the Government deliberately adduced these alleged perjuries to make it appear that Texas Adams was in the picture at an early date and that he bypassed Holland in the $90,000 transaction. Nowhere does he point to a single instance in which the prosecution

made such arguments to the jury. Indeed, in its Trial Memorandum, the Government twice expressly rejected Carroll's version of when Texas Adams came into the picture. (See the reprint of the Trial Memorandum in the appendix to Mittleman's brief on appeal. P iii par. 5, and p. vii first par third sentence).

12. Moreover, it was the Government that adduced Carroll's testimony that Holland *had* participated in the decision to advance the $90,000 (R 1980, 1984) It also was clear throughout the trial, from testimony adduced by the Government, that Texas Adams did not enter the picture until at least after the begnining of August. Holland testified that Dumont was the proposed vehicle for the merger at the July 22 meeting (R 1404-05). His first reference to Texas Adams was with respect to the September meeting. (R 1440). And Rosen testified that Texas Adams was found as the result of the advertisement placed in the Wall Street Journal in August (R 5169-72) Thus, the Government is accused of suppressing evidence which it actually adduced at trial. And, further, to the extent that Jones would contradict the alleged perjuries, his proposed testimony would at best be cumulative.

13. The second leg of Mittelman's motion is based on so-called newly discovered evidence. It is axiomatic that on a motion for a new trial, the movant must allege facts showing that a diligent attempt was made to secure this evidence before or during the trial. Mittelman alleges that Jones was unavailable since he was traveling in the Southwest while the defense was being presented. The Court will note that the trial record is completely barren of any attempt by Mittelman to ascertain Jones' whereabouts or any request for a continuance to locate him.

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Excerpts From Trial Judge's Comments on Newly Discovered Evidence as Basis of Motion (S. M. pp. 467, et seq.)

• • •

"The notice of motion is for a new trial under Rule 33 of the Federal Rules of Criminal Procedure and 28 USC, Section 2255.

The next sheet, signed by Mr. Rogge, is headed:

> "Motion for a new trial under 33 and 28 USC 2255.
>
> "Now comes the defendant, Leo B. Mittelman, by his attorney, O. John Rogge, and moves the Court, pursuant to Rule 33 of the Federal Rules of Criminal Procedure and 28 USC 2255 for a new trial in the interest of justice, because of newly discovered evidence, and because this newly discovered evidence also shows that the Government prosecutors, in an excess of zeal, systematically suppressed evidence favorable to this defendant. O. John Rogge, Attorney for Leo B. Mittelman."

The next paper is the affidavit of Leo B. Mittelman, consisting of 58 numbered paragraphs and covering 41 pages, sworn to May 15, 1962. I shall not read the affidavit in its entirety. I shall read, however, Paragraph 1 of Mittelman's affidavit.

> "1. I am one of the defendants in this case and make this affidavit in support of my motion for a new trial under Rule 33 of the Federal Rules of Criminal Procedure and 28 United States Code, Section 2255, in the interest of justice and because of newly-discovered evidence which shows suppression of evidence by the Government as well."

In Paragraph 10 of Mittelman's affidavit, the following language appears:

Excerpts From Trial Judge's Comments

"10. For a proper understanding of the force of the newly-discovered and suppressed evidence * * *"

In Paragraph 29 of the Mittelman affidavit, the following statement appears:

"Jones could have set the entire matter straight. The Government attorneys knew the facts from Jones, and what Jones told them could easily have been checked. But the Government kept Jones in readiness weeks at a time, and then suddenly shipped him off, thus suppressing the evidence that would have disclosed that I had not misappropriated shares of Homestead stock."

* * *

The Court: Paragraph 51 of the Mittelman affidavit contains the following language:

"The new evidence relates directly to material matters which represented the bones of the Government framework in the case against me."

Paragraph 52 of the Mittelman affidavit actually consists of a number of paragraphs. The last paragraph on page 35 of the Mittelman affidavit, there are three additional full paragraphs on page 36 and a run-over paragraph on pages 36 to 37 of the Mittelman affidavit.

* * *

On page 36 of the Mittelman affidavit, in one of the paragraphs following the paragraph quoted in the indictment, Mr. Mittelman says:

"I always knew that if Jones told the truth he could prove that Holland, Carroll and his former partner, Graham, were consumate liars. In a sense, therefore, while I could not know all the facts to which he could give answers, I knew that if he told the truth he could not hurt me.

Excerpts From Trial Judge's Comments

"I did not know, however, what he later told me when I met him by chance in New York, some months ago, but time after time he had demonstrated to the Government attorneys that Carroll and Holland had been lying."

The date of Mittelman's affidavit, as already noted several times, is May 15, 1962, so the expression "some months ago" means the early part of 1962.

• • •

The Court: The present motion papers, that is, the motion papers for a new trial, were May 14, 1962. The Court wants to know whether Mr. Baer objects to the receipt in evidence of Exhibit C for identification, which Mr. Rogge says is a copy of his brief.

Mr. Baer: Well, I do, your Honor, but I won't press it.
The Court: Do you make an objection?
Mr. Baer: Yes sir.
The Court: I sustain the objection.

I have read the brief from cover to cover. I am familiar with the cases cited therein and I sustain the objection on the ground that it has no pertinency to the issue. I have to decide, namely, whether or not the affidavits of Mr. Mittelman and Mr. Jones, which are the subject of the indictment on trial, are "material" within the meaning of Section 1621 of the perjury statute.

• • •

Mr. Wales: I wish to be heard on this matter, since this is a joint presentation by both defendants, Jones and Mittelman.

The legal standard for a Rule 33 motion, your Honor, and the legal standard for a 2255 motion are substantially different, and that is what causes this problem of materiality.

Excerpts From Trial Judge's Comments

In order for a motion for a new trial under Rule 33, No. 1, is a standard of newly-discovered evidence, and, No. 2, is that it doesn't assess the matter of credibility. The standard under Rule 2255 is one of Constitutional dimension and which goes to the fairness of the trial. The Supreme Court has held in Maryland vs Brady and other cases that suppression does go towards the concept of due process and affects the very integrity of a fair trial.

Now, the thrust of this motion was directed towards suppression, and therefore, it is directed towards the legal standard of 2255 and not 33.

Now, Arnold Enker, a very astute man, who is a law professor now at Minnesota, well understood this position, and in his position, which I think estops the Government from arguing otherwise, he takes the position that this is a 2255 motion, and there is more than enough in the record for the trial judge to say there was not a suppression, so the motion is denied on that score.

Now, the Government puts the defendant Mittelman especially, but also Jones, who also has the right to raise this issue, the Government wants its cake and wants to eat it, too. It defeats Mittelman's motion under 2255 on the theory, well, this is a 2255 motion, and the record does not substantiate suppression, and we don't have to be concerned with newly-discovered evidence, because it is not really raised. Then, it indicts Mittelman and says, but this is a motion for newly-discovered evidence, and, therefore, he has to pay the consequences for that, too. The Government wants it both ways.

At one time, it is not newly-discovered evidence, and now it is newly-discovered evidence. I say, your Honor, that the Government's position, through Mr. Enker, * * *"